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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Revision of Part 22 and Part 90)
of the Commission's Rules to)
Facilitate Development of)
Paging Systems)

WT Docket No. 96-18

PP Docket No. 93-253

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

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To: The Commission

COMMENTS OF JON D. WORD
PIONEER TELEPHONE COOPERATIVE, INC.

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March 1, 1996

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SUMMARY

Jon D. Word and Pioneer Telephone Cooperative, Inc. ("Pioneer") oppose the interim licensing rules proposed by the Commission in its Notice because they are both unnecessary and unduly restrictive. The interim licensing rules not only suspend acceptance of new paging applications, but also prevent the processing of numerous pending applications filed with the Commission prior to the freeze. In addition, the interim procedures in practice will prevent licensees from modifying their systems.

The Commission proposes the interim rules as part of its plan to license paging stations on a geographic basis by auction. Mr. Word and Pioneer contend that the Commission's proposal to restructure the licensing of the paging industry is not in the public interest. Enforcing a freeze on 931 MHz paging applications for the purpose of auctioning paging frequencies on a geographic basis is particularly inappropriate because under the rules currently in effect the Commission can avoid situations of mutual exclusivity.

The freeze will have an adverse effect on both licensees and the public. The freeze will prevent licensees from completing their system plans resulting for them in the loss of both a great deal of effort and money. The public will also lose. Licensees will not be able to provide service to the public on demand as

required of them by Section 210 of the Communications Act.

If the Commission insists on maintaining the freeze, Mr. Word and Pioneer recommend the following changes to the interim procedures. First, all pending applications filed with the Commission prior to the issuance of the freeze on February 8, 1996, should be processed. It is inequitable that applicants who filed their applications prior to the issuance of the freeze, and in accordance with the rules then in effect, be penalized for an after-the-fact change in the Commission's processing rules.

Second, licensees should be permitted to modify their systems so long as the proposed service contours overlap by more than 50 percent with the licensee's existing service contours as of February 8, 1996. Allowing modifications of this type will afford licensees the ability to continue to make necessary system expansions and therefore meet the communication needs of the public.

Mr. Word and Pioneer urge the Commission to consider carefully the impact of the proposed interim licensing rules and work with the paging industry to implement workable rules and procedures which meet the needs of the industry and the public.

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To: The Commission

**COMMENTS OF JON D. WORD AND
PIONEER TELEPHONE COOPERATIVE, INC.**

Jon D. Word ("Mr. Word") and Pioneer Telephone Cooperative, Inc. ("Pioneer"), by their attorneys and pursuant to FCC Rule Section 1.415, respectfully submit these Comments in response to the Commission Notice of Proposed Rule Making in this proceeding.^{1/} In the Notice the Commission suspended the acceptance of new paging applications and proposed the adoption of interim licensing procedures. The Commission sought comment on the interim licensing procedures proposed in the Notice on an expedited comment cycle "because of the urgency of interim licensing as an issue for incumbent paging licensees."^{2/}

I. Introduction.

1. Mr. Word has been engaged in the mobile telecommunications business for more than 12 years. Mr. Word individually and through related corporate and partnership

^{1/} Future Development of Paging Systems, FCC 96-52, 10 FCC Rcd ____ (February 9, 1996) (Notice).

^{2/} Notice at ¶ 143.

entitles, holds, controls or has substantial interests in numerous common carrier and private carrier paging licenses in the Rocky Mountain states which are currently serving more than 50,000 subscribers. Mr. Word is president and a substantial interest holder of Contact New Mexico, L.P., a radio common carrier licensee with facilities in New Mexico, Arizona, Colorado and Texas. In addition, Mr. Word personally is the licensee of a regional 931 MHz system providing service throughout the Rocky Mountain states. He has recently filed applications to expand his 931 MHz system which are pending and would be adversely affected by continuation of the freeze as currently proposed. Because the interim licensing procedures, as currently proposed, would adversely affect Mr. Word and the many subscribers to whom he provides service, Mr. Word has a significant interest in the outcome of this proceeding.

2. As stated above, Mr. Word, individually is the licensee of a regional 931.0375 MHz paging system providing service throughout the Rocky Mountain states. In accordance with his long range plans to expand and fill in that system, Mr. Word recently filed some 100 applications for modification and/or additional facilities with the Commission. These applications were filed pursuant to the existing rules, and in reliance thereon. Grant of these applications will allow for the needed expansion of his system and allow him to better serve his numerous subscribers. Mr. Word has spent a great deal of time and effort to develop and expand his paging systems. The applications he has on file represent a considerable monetary investment. However, a majority,

if not all, of his pending applications, would not be processed under the Commission's interim licensing procedures. This will result in Mr. Word's inability to both earn a return on his investment and to provide unimpaired service to his subscribers. Indeed, it may very well result in a complete loss of his investment. Moreover, he may be totally unable to modify his paging system to respond to growth and changes in demand for service from the public.

3. Pioneer is a local exchange carrier based in Kingfisher, Oklahoma. Pioneer serves 49,000 local exchange subscribers in 37 counties with 10,900 square miles of service area. Pioneer has been engaged in the mobile telecommunications business since 1962. Pioneer was one of the first common carriers to file for new 931 MHz frequencies when they first became available in the late 1970's and early 1980's. Pioneer holds numerous 931 MHz paging licenses in Oklahoma, serving thousands of customers with more than 11,000 square miles of coverage area in Central, Northwestern, Western, Southwestern and Eastern Oklahoma.

4. Pioneer filed new 931 MHz paging applications with the Commission on December 27, 1995 to expand and enhance the existing service area. Those applications were listed on the January 31, 1996 public notice as accepted for filing. However, due to the freeze, the applications will not be processed even though they were filed well in advance of the issuance of the freeze. If the Commission proceeds with interim licensing procedures as proposed, Pioneer's applications will not be processed even though they were

filed and placed on public notice well in advance of February 8, 1996.

5. The Notice proposes to scrap the current procedures for licensing paging systems on a transmitter-by-transmitter basis in favor of a geographic licensing scheme for all paging channels regulated under both Rule Parts 22 and 90. The right to use paging channels not already fully licensed within a set geographic area, such as a Rand McNally Major Trading Area or Basic Trading Area, or some other geographic designation, would be put up for auction.^{3/} To maintain the status quo while it considers its decision in this proceeding, the Commission has instituted a freeze on the acceptance of new paging applications, and proposes interim licensing procedures to be followed during the rulemaking process.^{4/}

6. The Notice proposes the following interim licensing procedures: (1) suspending the acceptance of new applications for paging channels; (2) accepting only those applications to add to or modify existing systems so long as the additions or modifications do not expand the interference contour of the incumbent's existing system; (3) processing only those pending non-mutually exclusive applications which were filed as of the adoption date of the Notice and for which the relevant period for filing competing applications has expired as of the Notice's adoption date; and (4) holding in pending status mutually

^{3/} Notice at ¶ 74.

^{4/} Notice at ¶ 139.

exclusive applications until the conclusion of this rulemaking proceeding.^{5/}

7. As Mr. Word and Pioneer show below, the Commission's proposals in the *Notice*, though well intentioned, are not conducive to promoting the public interest. The freeze that has been implemented and the interim licensing rules which have been proposed, threaten injury to the paging industry and degradation and denial of service to the public.^{6/} The freeze itself needs to be lifted as soon as possible. Applications filed up to close of business on the date of adoption of the *Notice* need to be processed, and the interim licensing procedures liberalized so that modest expansion and adjustment of incumbents' systems can be effected while the Commission gives due consideration to this proceeding.

II. The Commission should end the freeze on paging applications as soon as practicable and liberalize procedures for interim licensing and modification of paging systems.

A. Wholesale restructuring of licensing of the paging industry is not in the public interest.

8. The freeze on acceptance of new and major modification paging applications is intended to preserve the current frequency landscape so the Commission may move toward geographic licensing of paging stations by auction. It is the Commission's stated basis that "continuing to accept new applications under the current rules

^{5/} Notice at ¶ 145.

^{6/} Moreover, the freeze provides an unfair competitive advantage to large nationwide carriers who are able to provide expanded service.

would impair the objectives of this proceeding."^{7/} Although this is not the appropriate time to comment in detail on the substance of the *Notice*, some preliminary comment is in order, since the interim licensing procedures are admittedly designed to protect the objectives of the *Notice*.

9. It is not Mr. Word's and Pioneer's intent in these comments to oppose competitive bidding as a means to choose between competing paging applications. Congress has made that decision, and Mr. Word and Pioneer concur in Congress's judgement. Both Mr. Word and Pioneer find it distressing that speculators and huskers have recently taken to filing applications for paging channels with no real intent to provide public service.^{8/} This has resulted in many cases in legitimate paging concerns being blocked from using needed frequencies. The public ultimately suffers from such insincere applicants because it is denied needed service. Auctions prevent this evil because they help ensure that the parties which most value spectrum will acquire it.

10. Despite that the use of auctions to choose among competing applications assist in providing the public needed service, it does not follow that a wholesale restructuring of the licensing of the paging industry will serve the public interest. Mr. Word and Pioneer are concerned that the desire to auction paging licenses could tend to become the driving force behind the

^{7/} *Notice* at ¶ 139.

^{8/} Indeed, the commenting parties are aware that innocent members of the public have been induced to invest significant amounts in get rich quick schemes based on holding a paging license.

proposed restructuring to geographic licensing, rather than what is most conducive to the goal of ensuring the public's access to continued quality paging service. This would clearly be contrary, inter alia, to Congress's intent in granting the Commission auction authority.

11. In granting auction authority to the Commission, Congress set certain important limitations. The FCC may employ competitive bidding procedures only when: (1) there are mutually exclusive applications; (2) the applications are for an initial license or construction permit; and (3) the license is primarily to provide service to subscribers for compensation.^{2/} In addition, Congress mandated the Commission to consider whether auctions would promote the following four objectives:

- (1) development and rapid deployment of new technologies, products and services for the public's benefit, including those residing in rural areas, without administrative or judicial delays;
- (2) promotion of economic opportunity and competition, and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (3) recover for the public a portion of the value of the public spectrum resource made available for commercial use and avoid unjust enrichment through methods of employment to award uses of that resource; and

^{2/} See 47 U.S.C. § 309(j)(2) and (j)(3).

- (4) efficient and intensive use of the electromagnetic spectrum^{10/}

Moreover, the Commission is specifically prohibited from basing its finding of public interest, convenience and necessity on the revenues an auction may bring.^{11/}

12. As the Commission described in the Notice, the paging industry is mature and well established.^{12/} With little regulatory oversight, the paging industry has developed into one of the faster growing communications industries to date. The areas in the country in which unused paging spectrum is available are limited. Most applications filed with the Commission are designed to fill in coverage for existing systems, or modify existing systems to account for growth in demand, loss of transmitter sites, or the need for in-building penetration of paging signals. Only in the most rural of states, does any significant "white space" exist on paging frequencies. And this is simply because there is no existing demand for use of those channels in those areas. In most urbanized areas of the country, it is not possible to find vacant paging channels.

13. There is no dispute that paging licensees provide subscriber service to the public for compensation. However, as discussed above, paging applications generally are not for initial licenses at all, but seek to expand or modify existing systems.

^{10/} See 47 U.S.C. § 309(j)(3).

^{11/} See 47 U.S.C. § 309(j)(7).

^{12/} Notice at ¶¶ 4-7.

Thus, there is at least some uncertainty whether Congress envisioned that competitive bidding should be used in this circumstance. Nevertheless, assuming that competitive bidding will be used to resolve mutually exclusive application situations, as Mr. Word and Pioneer believe advisable, it should be done by such a means that the industry and public service is not disrupted. Accordingly, Mr. Word and Pioneer suggest the Commission tailor its auction authority to include only those applications for which mutual exclusivity cannot be resolved on a transmitter-by-transmitter basis.

14. Conversion of paging licensing from site specific to geographic licensing is unprecedented. If the Commission were writing on a clean slate, geographic licensing would be entirely appropriate. But it is not. In the context of the 800 MHz SMR industry, restructuring was necessary to effectuate the establishment of wide-area cellular-like systems, for which there were no specific licensing rules.^{13/} There is no similar need to disturb the established structure of the paging industry in this case, and the Commission should refrain from doing so.

B. Disruption of 931 MHz licensing is not justified.

15. Specifically, restructuring of 931 MHz paging licensing is not justified. These frequencies in particular have few unlicensed areas remaining. Auctioning the slivers of urbanized areas and those areas of sparse population remaining unlicensed is

^{13/} See *Future Development of SMR Systems*, 8 FCC Rcd 3950, 3954-57 (1993); *Future Development of SMR Systems*, 9 FCC Rcd 7988, 8043 (1994).

simply not a sufficient reason to disrupt and delay existing licensees' plans for system expansion. Because spectrum is particularly scarce for 931 MHz facilities, it is already in the hands of those who value it the most and who use it most efficiently.

16. Moreover, the imposition of a freeze on 931 MHz paging applications for the purpose of auctioning paging frequencies by a geographic licensing scheme is particularly inappropriate. As described more fully below, the rules in effect limit the number of mutually exclusive 931 MHz applications which must be resolved. Accordingly, the first criterion for use of auctions established by Congress, mutual exclusivity, does not exist in a majority of cases. Therefore, as long as the current rules remain in effect, there is no legal basis for conducting an auction in the majority of cases.

C. Imposition of a freeze on paging applications violates the common carrier obligation to provide service to the public on demand.

17. Section 210 of the Communications Act of 1934, as amended, specifically states "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."^{14/} Under the interim licensing rules the Commission has adopted, a serious threat exists that carriers will be unable to meet the service needs of the public.

^{14/} 47 U.S.C. § 210.

18. The paging industry is a growing and competitive service. To meet customer demand and remain competitive, a paging carrier must be able to expand and modify its system. The Commission recognizes this characteristic of the industry stating "[w]e are mindful that an across-the-board freeze on all applications could impair the ability of existing licensees to make certain necessary modifications to their systems to respond to consumer demand."^{15/} However, under the interim licensing procedures the Commission proposes, licensees will not adequately be able to meet consumer demand because they will be confined indefinitely to their existing service area. This will not only be detrimental to carriers' business but will have substantial adverse effect on the public's ability to obtain adequate service as well. ^{16/}

19. A typical paging system is not built all at once. Carriers develop their systems transmitter by transmitter. The freeze prevents licensees from completing their system plans and may very well force many carriers to break customer agreements that provided for additional coverage as their customers' operations grow. Accordingly, the freeze should be lifted so carriers may fulfill their obligations under Section 210 of the Act.

D. The Commission should process all applications filed prior to the announcement of the freeze.

20. If the Commission does not lift the freeze forthwith, it must nevertheless process to grant all those applications filed

^{15/} Notice at ¶ 140.

^{16/} Mr. Word already has customer requests pending for improved coverage.

with it through the date the freeze was announced. In its *Notice*, the Commission proposes to process pending applications that were filed prior to the *Notice's* adoption which are (1) not mutually exclusive with other applications as of the adoption date of the *Notice*, and (2) for which the relevant period for filing competing applications has expired as of the *Notice's* adoption date.^{17/} In Mr. Word's and Pioneer's view, the Commission's proposal is overly stringent and unfair. It should be modified or clarified as discussed below.

1. Applications filed prior to the Notice's adoption should be processed to grant.

21. The Commission announced it was suspending acceptance of new applications for paging channels in a late-day open meeting on February 8, 1996.^{18/} It is unclear both from the statements at the meeting and from the *Notice's* text the exact cut-off time for accepting new applications under the freeze, specifically whether applications filed on February 8, 1996 will be processed. In Mr. Word's case, a number of his applications were sent via overnight courier service on the evening of February 7, 1996, and were filed with the Mellon Bank at 11am on February 8, 1996. It would be inequitable not to accept applications on file with the Commission prior to the announcement of the freeze.

22. Considerable time and resources went into planning, preparing, and filing the modification and/or additional facilities

^{17/} Notice at ¶ 144.

^{18/} The Commission's meeting began approximately at 4 pm EST and adjourned at approximately 5 pm.

applications. These applications were submitted in compliance with the rules in effect at the time of filing. Applicants should not be penalized for an after-the-fact change in the Commission's processing procedures. To avoid issues of whether applications were or were not on file with the agency by the time of the announcement of the freeze, all applications filed through February 8, 1996 should be accepted.

2. The Commission should process all pending paging applications without regard to their public notice status.

23. Under the interim licensing rules proposed, the Commission will process only those pending applications for which the relevant public notice period for filing competing applications has expired.^{19/} In Mr. Word's and Pioneer's view, this is not the appropriate cut-off point. The overwhelming number of paging applications do not draw competing proposals. Given this fact, the Commission should process all applications received by the freeze date and put them on public notice for comment and the filing of competing applications, if any. Should no competing applications be filed with respect to a proposal, it should be processed in the normal course and granted if otherwise in compliance with the rules.^{20/}

24. In this connection, an important distinction must be made clear with respect to 931 MHz applications which makes the

^{19/} Notice at ¶ 145.

^{20/} If a competing application is filed, the application and any mutually exclusive application could be held in abeyance pending resolution of this proceeding.

possibility of mutually exclusive applications even more remote. The Commission appears to lump 931 MHz applications in with all the rest in suspending processing of applications for which the public notice period has not run. As detailed below, the Commission should not exclude from processing 931 MHz applications for which the mutually exclusive filing window has not run, since 931 MHz application are not generally mutually exclusive.

25. The licensing rules currently in effect allow an applicant to suggest to the Commission a particular 931 MHz channel to be licensed, but not specify such facility.^{21/} The Commission, however, has the discretion to assign any available 931 MHz frequency to the applicant thereby avoiding a situation in which there are mutually exclusive applications.^{22/} The Commission has used that discretion to avoid mutual exclusivity where possible, and to prefer the expansion of existing systems over the creation of new systems.^{23/} The Commission therefore, has even less reason

^{21/} See former Rule § 22.501(p)(2)(i). In its *Part 22 Rewrite Order*, the Commission revised the licensing rules for services in Part 22. See *Public Mobile Services*, 9 FCC Rcd 6513 (1994). Under the revised rules, 931 MHz applicants are required to specify the available frequency for which they are applying. New Rule Section 22.529(b)(3) Applications accepted for filing are then placed on public notice which begins a 30-day window to file competing applications. New Rule Section 22.541. Because specific channels are requested, the possibility of two or more applications being filed for the same frequency in the same area, is greatly increased. Originally, the revised rules were to go into effect on January 1, 1995. However, on December 30, 1994, the Commission stayed the new rules, which the Notice maintains. See Notice at ¶¶ 12, 145.

^{22/} *Id.*

^{23/} See *Jon D. Word*, 7 FCC Rcd 3201 (1992)

to suspend processing of 931 MHz applications for which the filing window has not expired, since the Commission can avoid, in most instances, mutual exclusivity.^{24/}

E. The interim licensing procedures must provide flexibility to modify paging systems in response to demand.

26. Although recognizing that paging licensees must be allowed to modify their systems to continue to operate their businesses and meet public demand,^{25/} the Commission proposes to implement licensing procedures which in reality will not afford licensees adequate flexibility to effectively serve the public. The interim licensing procedures provide for certain limited modifications. The Commission proposes to permit the addition to, or modification of, an existing system so long as the system's interference contours are not expanded.^{26/} In addition, the Commission seeks comment whether to permit on a secondary basis modifications which expand a system's interference contours.^{27/} These proposals simply do not provide existing licensees sufficient flexibility to expand their systems in response to public demand. Accordingly, the Commission should liberalize the modifications existing licensees may make to their systems as discussed below.

^{24/} Mr. Word and Pioneer recognize there are situations in which there are an insufficient number of 931 MHz channels for the Commission to assign to each timely filed applicant. In these instances, the Commission obviously cannot avoid mutual exclusivity.

^{25/} Notice at ¶ 140.

^{26/} *Id.*

^{27/} Notice at ¶ 143.

27. A workable alternative to the Commission's proposals would permit a licensee to modify its existing system so long as the proposed service contours of any additional or modified site overlap by more than 50 percent with the licensee's existing composite service contours as of (or proposed by) February 8, 1996.^{28/} Licensing in this manner would afford licensees a reasonable degree of flexibility to modify their systems while preserving, in substantive part, the landscape for future geographic licensing should the Commission ultimately adopt such a proposal. Allowing modifications of this type will afford licensees the ability to continue to make necessary system expansions and therefore meet the communication needs of the public for the considerable time this proceeding may be pending.^{29/}

28. Although the Commission's proposal to allow service area expansion on a secondary basis may preserve the current landscape for geographic licensing, it is not a viable alternative to an industry that must constantly modify its systems to keep pace with subscriber demand. Companies, particularly small businesses, cannot invest the time and money to construct new or modified facilities only to later find themselves without interference

^{28/} The composite coverage area should be defined to include pending modifications currently on file by the freeze date since the applications were filed under, and are being processed pursuant to, the rules in effect prior to that date.

^{29/} Mr. Word and Pioneer understand the Commission's intent to expedite this proceeding. Nevertheless, the Commission's workload is heavy and its budget tight. Mr. Word and Pioneer are concerned that because of those facts the Commission's timetable for deciding this proceeding could slip.

protection and without the ability to continue providing service to their subscribers. A paging licensee in that position would not only risk loss of time and financial resources, but also customer loyalty. In this highly competitive industry, customer loyalty is particularly important. Thus paging licensees could be left with the Hobson's choice either to maintain the status quo which could be debilitating to their business, or take a sizeable and perhaps imprudent financial risk. It is therefore imperative that licensees be permitted to modify their facilities as described above and maintain full interference protection for these modifications. If however, a licensee should desire in any particular application to go beyond the limits set forth above, it should be permitted to do so on a secondary site basis pending the lifting of the freeze.

IV. Conclusion.

29. The Commission's proposed changes set forth in the Notice would effect a fundamental restructuring of the licensing of the paging industry. Moreover, the freeze the Commission has imposed places paging licensees in the vulnerable position of being unable to fill out their systems or modify those systems to accommodate changes in, and growth of, demand for service. Therefore, the Commission must seriously consider whether its proposed changes are in the best interest of the paging industry and the public, and it must adopt interim procedures that are workable and tailored to the industry's obligation to meet the public's demand for service.

30. The interim licensing procedures proposed in the Notice offer an inadequate practical framework within which to provide service during the pendency of this proceeding. Recognizing that this proceeding could dramatically alter the future of the paging industry, Mr. Word and Pioneer implore the Commission to work with the paging community on a flexible licensing approach which meets the needs of the industry and the public.

Respectfully submitted,

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March 1, 1996

CERTIFICATE OF SERVICE

I, Sloane Stupica, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 1st day of March, 1996, had a copy of the foregoing Comments hand-delivered to the following:

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